

February 20, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of) REGULATORY DIVISION
NorthWestern Energy for Hydro Assets)
Purchase) DOCKET NO. D2013.12.85

**STATEMENT OF DISSENT OF COMMISSIONER KAVULLA
TO NOTICE OF COMMISSION ACTION**

While I agree with the Commission's decision to overrule and sustain certain objections to data requests related to NorthWestern Energy's (NorthWestern) evaluation of coal facilities, I strongly oppose the notion that certain data requests should be sustained on the basis that they request new analysis.¹

The Commission's given reason for sustaining these was that Rule 34 of the Montana Rules of Civil Procedure controls the practice of issuing data requests. This is not correct, and is a departure from a lengthy history of practice and a violation of our own administrative rules.

The Commission is required by law to adopt rules to govern its proceedings. Mont. Code Ann. §§ 69-2-101; 69-3-103(2)(b) (2013). In doing so, the Commission has frequently issued procedural orders, such as the one in this case, that provide for the use of data requests as the "primary," but not sole, discovery technique. Or. 7323b ¶ 7 (Jan. 16, 2014).

When the Commission adopted its rule on discovery nearly four decades ago, it clearly distinguished between "techniques of prehearing discovery permitted in state civil actions" and "data requests." Admin. R. Mont. 38.2.3301(1) (2014). Our rule holds that the former "may be employed in commission contested cases and *for this purpose* the commission adopts" the Montana Rules of Civil Procedure. *Id.* (emphasis added). Data requests are, by definition, not subject to that treatment. Instead, as the rule makes clear, "Nothing in (1) of this rule shall be construed to limit the free use of data requests among parties." *Id.* at 38.2.3301(2).

¹ See Notice of Commn. Action (Feb. 20, 2014). These are Data Requests PSC-015c, PSC-041, PSC-055d, PSC-055e, PSC-075b, MCC-003a, MCC-003b, MCC-005, MCC-080, and MCC-091.

By the plain letter of our rules, the Montana Rules of Civil Procedure do not control data requests. The Commission should, and must, follow its own rules—and it especially should not change the rules of the game in the middle of the first quarter. It has done just that in this action, and its decision threatens the integrity of this proceeding.

Data requests are not a method of discovery used in Montana courts. They are unique to the administrative practice of the Commission, and they are employed here because of the highly technical nature of our duties. In this instance, the Data Requests at issue asked for analysis which is sometimes time-consuming to prepare, but which also arrives at the critical issues in the billion-dollar decision the Commission will have to make, and which interveners are not in a position to create.

As one legal authority on utility commissions has noted, "Commissions are not courts; regulators are not judges." Too often regulation is guided by the "incorrect premise" that private parties' "evidentiary submissions will produce information sufficiently relevant and objective to discern the public interest."² That is the crucial reason why the Commission employs data requests.

In this instance, the Montana Consumer Counsel used one of its first data requests to ask NorthWestern to provide a year-by-year estimate of the average residential customer bill with and without the purchase of the hydroelectric dams which are the subject of this acquisition. *See* Data Request (DR) MCC-005 (Jan. 3, 2014). That is a highly relevant question; indeed, it is consumers' first and primary interest in this proceeding.

The Commission is correct that such a data request requires new analysis. A request for production of the same thing would not be welcome in the courts of this State, because under Rule 34 you cannot produce what you do not have (it requires production of documents "in the responding party's possession, custody, or control."). But the game is played differently at the Commission—or at least it should be.

The applicant is frequently the only party with the resources to create analysis. For example, NorthWestern alone owns a license for the proprietary software PowerSimm, which produces the modeling outcomes that are cited as central evidence that granting pre-approval of this acquisition is in the public interest. Already in this proceeding, a data request that asked the applicant to furnish new analysis using that model was answered satisfactorily, notwithstanding

² Scott Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators*, 2013, pp. 47-50.

an initial objection. *See* DR PSC-047 (Jan. 2, 2014). Similarly, MCC-005 and the related data request MCC-003 ask for different runs of spreadsheet models, and while Excel is less complicated than PowerSimm, the interveners and the Commission do not have the information that would be necessary to calculate the bill impacts and revenue requirements that the data requests inquire after. It is unfortunate that these questions will now go unanswered.

In responding to the objections, the Montana Consumer Counsel put it aptly:

It is no objection to say that NWE cannot run a different set of numbers than those it has run previously. For the Commission to allow NWE to hide behind the argument that it doesn't 'have' the information is to encourage the filing of applications predicated upon data that cannot be tested, questioned or have any meaningful comparison.

MCC Br. in Response to NCA p. 9 (Feb. 12, 2014). Without being able to ask questions that occasionally require new or reworked analysis, the public interest will be harmed inevitably.

The objections to these data requests should have been overruled, and the underlying data requests should have been answered.

For the foregoing reasons, I respectfully DISSENT

Travis Kavulla, Commissioner (dissenting)